85-1627

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

FRED MAYER, Property Owner,
Summit County, Ohio,
Petitioner,

vs.

EDWARD DAVIS, CITY OF AKRON, OHIO
and PATRICIA C. AMBROSE,
Agent for Annexation Petitioners,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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April 3, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Does the concept of federalism result in states enjoying absolute immunity from federal judicial scrutiny of violations of the individual's *Fifth and Fourteenth Amendments'* rights to due process and equal protection of the law, in all matters involving political subdivision boundary changes?

2. Does the substantive and procedural due process requirement of the *Fifth and Fourteenth Amendments* require a state government to permit the sole owner of land proposed for annexation to a city, to stop the annexation prior to its completion, upon a showing that said annexation would adversely affect the property owner?

For the reasons enunciated herein, petitioners believe the answer to issue one (1) must be no; that the answer to issue two (2) must be yes.

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Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

To the Honorable the Chief Justice and
the Associate Justices of the Supreme
Court of the United States:

The petitioner, FRED MAYER, hereby petitions this honorable court for a writ of certiorari to review a judgment and opinion of the Ohio Supreme Court rendered in this cause on December 4, 1985, and respectfully shows:

OPINIONS IN THE COURTS BELOW

The Ohio Supreme Court's opinion:

Fred Mayer, Appellant v. Edward Davis, et al., Appellees. (December 4, 1985), Unreported.

Copy of the opinion and judgment attached as Appendix A3.

The Ninth Ohio District Court of Appeals granted a stay, pending this action in the United States Supreme Court on December 16, 1985 and copy of the stay attached as Appendix A1.

The Court of Appeals' opinion:

Fred Mayer v. Edward Davis, et al. (August 28, 1985), Unreported.

Copy of the Decision and Journal Entry attached as Appendix A4.

The Common Pleas Court's opinion:

Fred Mayer v. Edward Davis, et al. (February 26, 1985), Unreported.

Copy of the opinion and judgment attached as Appendix A9; Appendix A10.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was dated and entered December 4, 1985. No application for rehearing was made. The statute conferring on this court jurisdiction to review such judgment by writ of certiorari is 28 U.S.C. 1257 (3).

Respondents will argue that this Court has no jurisdiction because the federal constitutional question was not formally assigned as error at the first appellate level. They will be wrong.

On the facts of this case, an irrebuttable presumption exists that the federal question was properly raised.

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in

question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court . . . (there must) . . . be an explicit and timely insistence in state courts that a state statute, as applied, is repugnant to the Federal Constitution. . ."

Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 185-186.

Here, the Ohio Supreme Court's judgment entry expressly found that "no substantial constitutional question exists. . ." Appendix A3. To so rule, the Ohio Supreme Court *must* necessarily have considered the constitutional question. Further, the pleadings clearly raise the federal constitutional issue, as discussed more fully in Statement of the Case, pages 6-11 *infra*.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States, pertinent portions of which provide:

". . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the Constitution of the United States, pertinent portions of which provide:

". . . No state shall make or enforce any law which shall abridge the privileges or, immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES INVOLVED

28 U.S.C. 1257(3), which provides in pertinent part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) . . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

STATE STATUTES INVOLVED

Section 709.01, et seq., Ohio Revised Code. See Appendix A16 through A34.

STATEMENT OF THE CASE

Appellant, Fred Mayer, objects to the annexation of 1.033 acres of his land from Northampton Township, Summit County, Ohio, to the City of Akron. The controversy began on February 9, 1984, when Fred Mayer and his then business partner, David Meeker, signed a petition for annexation as co-owners of 1.033 acres of commercial prop-

erty. Subsequently, the business partnership terminated, and on January 11, 1985, Fred Mayer became the sole owner of the commercial property. Mayer discovered that the annexation would affect his property rights by making the commercial land more difficult to lease: he would lose tenants presently leasing his property, thus losing rental income, and his taxes would increase as a result of the annexation. The Summit County Council on December 17, 1984 approved the annexation of Fred Mayer's land to the City of Akron. Twenty days after becoming the sole property owner, Fred Mayer, appealed to the Summit County Common Pleas Court, alleging a constitutionally protectable legal right or interest in the annexation, as the sole owner of the property, together with state grounds for appeal.

The Trial Court sustained Fred Mayer's appeal and denied the annexation of Fred Mayer's property. The Trial Court specifically found that Fred Mayer's legal rights and property interests would be adversely affected by the annexation (See order of Trial Court, Appendix, page A11).

The Ninth Ohio Appellate District reversed the Trial Court. While the Ohio Appeals Court left intact the Trial Court's Finding that Fred Mayer's legal and property interests were adversely affected by the annexation, it permitted the annexation to proceed, over Mayer's objections. Thus, the Ninth Ohio Appellate District rejected any federally grounded constitutional challenges, and ordered the lower court to enter an order granting the annexation of Fred Mayer's property over Mayer's objection (See Appendix, pages A4 through A8).

Mayer moved the Ohio Supreme Court for an order directing the Ninth Ohio District Court of Appeals to certify

its record for review, alleging the Fourteenth Amendment property right and due process violations as one ground of appeal. The Ohio Supreme Court denied the motion (See Appendix, page A3).

Subsequently, on December 16, 1985, the Ninth Ohio District Court of Appeals granted a stay order delaying final action on the annexation, pending action by the U.S. Supreme Court on an appeal, or petition for writ of certiorari.

The judgment appealed from is a final judgment of the highest state court in Ohio. The Ohio Supreme Court refused to hear Fred Mayer's appeal, finding "no substantial constitutional question" to review (Appendix A3).

Thus, the Ninth Ohio District Appeals Court decision and opinion was upheld. The decision of the appeals court is clearly a final decision. "The assignment of error is sustained and this cause remanded to the Common Pleas Court to enter final judgment for the Appellant, City of Akron (decision of Ninth Ohio District Court of Appeals, p. 4; Appendix, p. A7).

Thus, all that remained to be done by any Ohio Court was a ministerial act, i.e. the entry of a judgment upon a mandate.

Thus, this case meets the requirement of finality, *Board of Commissioners v. Lucas*, 93 U.S. 108.

28 U.S.C. 1257(3) permits this Court to review on certiorari cases wherein the federal constitutionality of a state statute is drawn in question or an individual's federal rights, privileges or immunties have been specially set up or claimed.

As to the "drawn in question" issue, this Court has stated:

> ". . . if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York, ex rel. Bryant v. Immerman*, 278 U.S. 63, 67.

In an affidavit filed with the Trial Court on February 20, 1985, Fred Mayer stated, in pertinent part:

> ". . . .
>
> 2. The proposed annexation adversely affects my legal rights and interests as follows:
>
> a) I am the owner of the property to be annexed and I do not desire the property to be annexed;
>
> b) Annexation will result in higher taxes and costs to me with no corresponding increase in services;
>
> c) The annexation will make my property more difficult to lease. Current tenants have indicated they would not be interested in continuing their tenancy if the property is annexed;
>
> d) If a stay pending further proceedings is not granted and if the injunction against annexation pursuant to 709.07 is not ultimately granted on the merits, then my land will be annexed by City Council and to avoid the annexation will become moot. In the absence of a stay order, this action will become moot and will result in great irreparable harm to my interest as landowner of the property.
>
> . . . .

8. In addition, during this time period, Northampton Township and the City of Cuyahoga Falls formed a merger commission to consider merging the two communities. I would much rather my land be located in the City of Cuyahoga Falls than in the City of Akron. This option would be forever denied to me if the land is annexed to the City of Akron.

9. I do not desire that my land be annexed to the City of Akron and I have brought this action in order to avoid my land being annexed.

. . . ."

The Trial Court ruled in Fred Mayer's favor granting the injunction. The City of Akron appealed.

The Ninth Ohio District Court of Appeals reversed the Trial Court, and ordered final judgment entered for the City of Akron. Even so, the Court of Appeals stated:

"First, the petitioner must demonstrate by clear and convincing evidence that his legal interests or rights would be adversely affected by the annexation. Mayer has satisfied this first requirement by his showing that the annexation would cause him to pay higher taxes, would make his property more difficult to lease, and would cause him to lose those tenants presently leasing his property. . ." Opinion Court of Appeals, Appendix A7.

Mayer sought review by the Ohio Supreme Court.

Mayer's Memorandum in Support of Jurisdiction to the Ohio Supreme Court, made the following points:

Page 5.

"Both the Trial Court and Appeals Court found that Fred Mayer is adversely affected by the annexation.

As sole owner of the property proposed to be annexed, Mayer's property interests are harmed by the annexation. The annexation will cause him to lose tenants currently leasing the property, will make the property more difficult to lease, and will result in higher taxes and no increase in local government services.

The sole owner of the property opposes the annexation. His property rights are adversely affected by the annexation."

At Page 11.

"The property and due process rights of Fred Mayer compel a finding that Summit County Council's violation of its own ordinance in acting on the annexation was error for purposes of *709.07*, Ohio Revised Code.

. . . .

Further, the Supreme Court is in a position to correct the injustice done to the property and due process rights of property owner, Fred Mayer."

At Pages 13-14.

"To the extent that Appellant Mayer relied on Summit County *Ordinance 83-226, Section 1(M)* to his detriment, this case involves constitutional issues regarding the citizens property rights vis-a-vis the local government's arbitrary action in ignoring its own ordinance." At Page 14.

"This Court should review the issues raised herein because:

1. . . .

2. . . .

3. . . .

4. . . .

5. Important federal property and due process rights are involved in this, as to Appellant Mayer's detrimental reliance on *Ordinance 1983-226, Section 1(M)*, Appellant Fred Mayer's property rights have been denied by permitting the City of Akron to annex property owned by him alone, over his strenuous objection.

. . . .

Appellant submits this case involves constitutional questions of due process and statutory interpretation, together with matters of great public and general interest that compel the invocation of this Court's jurisdiction."

The Ohio Supreme Court declined to take jurisdiction of the case finding ". . . no substantial constitutional question exists therein." (Justice Brown dissenting).

On December 12, 1985, Fred Mayer filed his Notice of Appeal to the United States Supreme Court with the Ohio Supreme Court. Mayer's Notice of Appeal stated in pertinent part:

". . . .

This appeal involves the Federal constitutional right to due process under the United States Constitution, 14th Amendment and involves the procedural due process element that specific findings by County Commissioners are necessary, prior to the passage of a resolution permitting annexation.

This appeal also involved Federal constitutional property rights as well as issues of federalism, as to

whether or not a state may ignore Federal constitutional rights of individuals in matters of political subdivision boundary changes.

. . . ."

No adequate state grounds exist to support the lower court's decision because the state grounds (i.e. the validity of 709.07 as applied) are the basis of the Federal question raised. That is, petitioner urges that as a landowner, his property may not be annexed over his protests when he can (and did) prove an adverse effect on his property interests. To do so is violative of the U.S. Constitution Fourteenth Amendment provision that no state shall deprive any person of property without due process of law, and the U.S. Constitution, Amendment 5, which prohibits a state's taking property without just compensation. The state grounds relied on below are that, although Petitioner property owner, Fred Mayer, showed an adverse impact on his property interests, the state could annex his property over his protests, as no "error in the proceedings" occurred before the state administrative body (the Summit County, Ohio Council) which decides annexation matters.

This is not an adequate state ground that would permit the decision below to stand in the face of the Federal Constitutional challenge of the petitioners.

SPECIFICATION OF ERRORS TO BE URGED

1. Lower Federal Courts, And State Courts Throughout The United States, Wrongly Rely On *Hunter v. Pittsburgh*, 207 U.S. 161 (1907) For The Proposition That State Action In Regard To Political Subdivision Boundary Changes Is Immune From Federal Judicial Scru-

tiny, Violations Of Federally Guaranteed Constitutional Rights Notwithstanding. This Case Provides The Court With The Opportunity To Review *Hunter* In Light Of Modern Constitutional Principles, And In Light Of Present Concepts Of Federalism.

2. The Ohio Courts Erred In Finding That Sole Property Owner, Fred Mayer, Although His Interests Were Adversely Affected By The Annexation Of His Property, Had No Constitutionally Protected Property Rights In The Annexation, And Thus Applied O.R.C. 709.07 In A Manner That Resulted In A Taking Of Property Without Due Process Or Just Compensation, In Violation Of The Fifth And The Fourteenth Amendments To The United States Constitution.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS TO THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO REVIEW HUNTER v. CITY OF PITTSBURGH, 207 U.S. 161, 28 S. CT. 40, 52 L. ED. 151 (1907).

This case is considered the seminal case in the area of the application of federal constitutional rights to annexation proceedings. The case pre-dates the application of the Bill of Rights to the States through the Fourteenth Amendment of the United States Constitution. As such, the *Hunter* case cries out for review and modification by the United States Supreme Court.

Hunter states, in pertinent part as follows:

"The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without com-

pensation such property, hold itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally, with or without the consent of the citizens or even against their protest. In all these respects, the state is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, to the unaltered or continued exercise existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." 207 U.S. at 178, 179, 28 S. Ct. at 46, 47.

Hunter at 28 S. Ct. 45 also makes the pronouncement that "The Fifth Amendment to the Federal Constitution is not restrictive of state . . . action." In light of the decisions of this Court since 1907, applying the *Fifth Amendment* and other portions of the Bill of Rights of the United States Constitution to the states through the *Fourteenth Amendment,* this pronouncement is outdated.

There is no reason for exempting annexation procedures from the requirements of due process and just compensation for the taking of property, which apply to all other areas of state legislative activity.

Under modern constitutional theory, there is no reason for the continued validity of the *Hunter* case, which

appears to confer absolute immunity from judicial scrutiny upon all changes which a state may make in its political subdivision boundaries. Petitioners doubt that the United States Supreme Court would currently grant such absolute immunity from federal judicial scrutiny.

The United States Supreme Court has found cases involving political subdivision boundaries to involve justiciable constitutional issues. *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). Yet, lower courts continue to rely on *Hunter* for the proposition that state political subdivision boundary changes are *not* subject to federal judicial scrutiny to determine if said boundary changes comply with the United States Constitution.

The United States District Court for the Southern District of Ohio reviewed several such decisions in *Jefferson Tp. v. City of West Carrollton,* 517 F. Supp. 417 (1981) at 419-420.

> "The United States Court of Appeals for the Sixth Circuit had occasion to pass upon the viability of Hunter in two decisions rendered within weeks of each other in 1967. In *The Detroit Edison Company v. East China Township School District, No. 3,* 378 F. 2d 225, cert. denied, 389 U.S. 932, 88 S. Ct. 296, 19 L. Ed. 2d 284 (1967), the Court affirmed the district court's reliance upon *Hunter* for the proposition that "(A)ny alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution", leading to the conclusion that the annexation procedure followed was a legislative matter not justiciable under the due process or equal protection clauses of the Fourteenth Amendment. The court pointed out that, as of that time, both the Fifth and Tenth Cir-

> cuits had had occasion to pass on cases where the constitutionality of a state annexation procedure was raised and, in both cases, the appellate courts relied upon *Hunter* in affirming dismissal of their respective cases. *Hammonds v. City of Corpus Christi,* 343 F. 2d 162 (5th Cir.), cert. denied, 382 U.S. 837, 86 S. Ct. 85, 15 L. Ed. 2d 80 (1965); *International Harvester Co. v. Kansas City,* 308 F. 2d 35 (10th Cir. 1962), cert. denied, 371 U.S. 948, 83 S. Ct. 503, 9 L. Ed. 2d 498 (1963). In *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F. 2d 321 (6th Cir.), cert. denied, 389 U.S. 975, 88 S. Ct. 476, 19 L. Ed. 2d 467 (1967), the Court upheld a trial court decision to the effect that *Hunter* precludes constitutional challenge under the Fourteenth Amendment from annexation by municipal corporations of adjoining territories on the basis of the procedure employed or authorized by the state, regardless of the pecuniary repercussions from taxation, etc. . ."

These interpretations do not square with recent United States Supreme Court pronouncements regarding the federalist principles involved in the United States Constitution. See, for example, *Garcia v. San Antonio Metropolitan Transit Authority,* ..... U.S. ....., 105 S. Ct. 1005 (1985).

A grant of the requested petition for writ of certiorari will allow this Court to review *Hunter* and modify it to conform to modern constitutional principles.

Of course, Petitioner will urge that the United States Supreme Court take the same view as expressed by Mr. Justice Frankfurter in *Gomillian v. Lightfoot,* 364 U.S. 342, 344, 81 S. Ct. 125.

Further, the questions raised in this case are of paramount importance to millions of citizens and property owners in the United States, whose properties in unincorporated areas are being annexed by neighboring municipalities.

The absentionist position of the *Hunter* court, has been counterproductive to the goals of the federalism. Instead of fostering experimentation in governmental subdivision structure among the states, it has resulted in municipal forms of government destroying viable and effective town and township forms of government. Federalist doctrine would, in its purest sense, encourage the establishment of units of government that provide basic services at low cost as alternatives to big city, big government municipalities. Instead, the doctrine as applied in the *Hunter* case has resulted in the destruction of such alternative governmental units.

2. THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS REQUIREMENT OF THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE A STATE GOVERNMENT TO PERMIT THE SOLE OWNER OF THE LAND PROPOSED FOR ANNEXATION TO A CITY TO STOP THE ANNEXATION PRIOR TO ITS COMPLETION, UPON A SHOWING THAT THE ANNEXATION WOULD ADVERSELY AFFECT THE PROPERTY OWNER.

As this Court stated in *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972):

> "We have made clear in *Roth* . . . that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather,

> property denotes a broad range of interests that are secured by "existing rules or understandings" . . . A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."
>
> "The Courts view has been that as long as a property deprivation is not deminimus, its gravity is irrelevant to the question whether account must be taken of the Due process Clause." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342, 89 S. Ct. 1820, 1823, 23 L. Ed. 2d 349 (1969).

Interestingly, the Ohio Courts below view the due process rights afforded property owners in annexation matters to be *less* important and require *less* procedural due process protection than that afforded a high school student's interest in a one (1) day suspension from school. See *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

Fred Mayer clearly established by clear and convincing evidence that the annexation of his property would cost him current tenants (and thus rental income); and make his commercial property more difficult to lease.

Fred Mayer, prior to the completion of the annexation, objected to the annexation of his property, based on the property loss that would result for him.

The annexation may well provide benefits to respondent, City of Akron. The Fifth Amendment, however, provides in pertinent part that no person shall be ". . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The City of Akron should not be permitted to benefit by an annexation over the objection of the property owner. In this context, the annexation, by its adverse impact on Fred Mayer's property interests in this commercial real estate, results in a taking without just compensation.

The Fourteenth Amendment provides, in pertinent part ". . . nor shall any state deprive any person of . . . property, without due process of law. . ."

Ohio's annexation laws have been applied so as to deny Fred Mayer due process of law.

Although the annexation is not final until the City of Akron Council acts to accept the land (O.R.C. 709.04 and O.R.C. 709.10), Ohio prevents a landowner from stopping the annexation in the face of a showing by clear and convincing evidence that the person's property rights are adversely affected by the annexation.

Mayer originally petitioned for the annexation. As business conditions changed, he realized the annexation adversely affected his property interests. Prior to the acceptance of his property for annexation by Akron City Council, Mayer protested the annexation.

In light of the taking of property that will result if the annexation is permitted, Fred Mayer should, pursuant to the Fifth and Fourteenth Amendments, be permitted to stop the annexation of his land at anytime before the annexation is finalized.

Ohio's annexation law provides no due process whereby a property owner can prevent the annexation of his land to a municipality, when changing circumstances dictate.

Thus, this matter relates back to the first question presented, in that, this attack on *Hunter, supra,* is designed to

prevent that case from permitting a state to take Fred Mayer's property by annexation, without just compensation and without meaningful due process.

This Court's decision in *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 99 S. Ct. 383 (1978) does not weaken Mayer's attack on the continuing validity of *Hunter.*

Holt, supra, was a voting rights case, involving equal protection analysis, and did not involve the Fifth and Fourteenth Amendments' taking of property without just compensation and without due process.

The majority opinion in *Holt* stated:

> "While the broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases such as *Kramer v. Union Free School Dist., supra,* we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." 439 U.S. 70, 71, 99 S. Ct. 393, at 390.

Of course, no state legislature can consent to a waiver of its citizens' federal constitutional rights, pursuant to the Fifth and Fourteenth Amendments.

As noted by the dissent of Justices Brennan, White and Marshall in *Holt* at footnote 8:

> "(S)tatutes structuring local government units receive no less exacting an examination merely because the state legislature is fairly elected. See *Avery v. Midland County,* 390 U.S. 474; 48 n. 6, 88 S. Ct. 1114 (1968) and *Kramer v. Union Free School District,* 395

U.S. at 628, n. 10, 89 S. Ct. at 1890." *Holt, supra,* at 439 U.S. 60, 81, n.8, 99 S. Ct. 383, 395 n.8.

Hunter is ripe for review in the context of Fifth and Fourteenth Amendments, taking of property without just compensation and due process analysis.

Although both the majority and dissent in *Holt, supra* noted that the broad pronouncements of *Hunter* were outdated, Courts across the United States continue to rely on the case to permit states to deny citizens federal constitutional rights. See for example, *Carlyn v. Akron,* 726 F.2d 287 (6th Cir. 1984); *Deane Hill Country Club v. City of Knoxville,* 379 F.2d 321 (6th Cir.) *cert. denied* 389 U.S. 975 (1965).

See also *Township of Jefferson v. City of West Carrollton,* 517 F. Supp. 417 (S.D.Ohio 1981), *aff'd.* 718 F.2d 1099 (6th Cir. 1983) (the *Hunter* case ". . . reflects a viable principle of law that annexation matters fall entirely within the discretion and standards of the state constitution. . ." *Id.* at 419); *Detroit Edison Company v. East China Township School District, No. 3,* 378 F.2d 225 (6th Cir. 1967), *cert. denied,* 389 U.S. 932 (annexation procedure is a legislative matter, not justiciable under the due process or equal protection clauses of the Fourteenth Amendment, Federal Constitution); *Hammonds v. City of Corpus Christi,* 343 F.2d 161 (5th Cir.), *cert. denied,* 382 U.S. 837 (1965); *International Harvester Co. v. Kansas City,* 308 F.2d 35 (10th Cir. 1962), *cert. denied,* 371 U.S. 948 (1963).

Contrast these pronouncements with those of the majority in the most recent U.S. Supreme Court case considering issues of state sovereignty.

"Finally, the developed application, through the Fourteenth Amendment of the greater part of the

Bill of Rights to the states limits the sovereign authority that states otherwise would possess to legislate with respect to their citizens and to conduct their own affairs." *Garcia v. San Antonio Metropolitan Transit Authority,* ..... U.S. ....., 105 S. Ct. 1005, 83 L. Ed. 2d 1016-1032 (1985).

Contrast the broad pronouncement of state sovereignty in *Hunter,* with the language of *Garcia,* that states retain their sovereign powers ". . . only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia, supra,* at 1033.

This case presents the Supreme Court the opportunity to review *Hunter* in the context of the Fifth and Fourteenth Amendments, taking of property without just compensation and without meaningful due process analysis.

Further, this case offers the Supreme Court the opportunity to review the Tenth Amendment issues of state sovereignty, in the annexation context, in light of *Garcia, supra.*

Finally, this case presents the dissenting justices in *Garcia* the opportunity to define concepts of federalism in a context other than commerce clause analysis.

Petitioner's counsel is obligated to advise the Court of matters outside the record, which could affect the Court's decision to take jurisdiction of this matter. On January 1, 1986, Northampton Township, Summit County, Ohio, was merged with and into the City of Cuyahoga Falls, Summit County, Ohio, pursuant to O.R.C. 709.43 through 709.48 inclusive. The merger became effective after the Ohio Supreme Court had ruled in the instant case. This event could have provided an adequate state ground for the Ohio Supreme Court to reach a result

opposite to that reflected by its journal entry, had it occurred when the Ohio Supreme Court retained jurisdiction of the case. The legal reasoning for this proposition is as follows:

1. Under Ohio Law, land cannot be annexed from a municipality to a municipality by operation of O.R.C. 709.02 to 709.12.

2. On January 1, 1986, by operation of Ohio Law, the territory formerly known as Northampton Township became part of a chartered municipal corporation (O.R.C. 709.47 and 709.48).

3. The Ohio Supreme Court, in *Board of County Commissioners v. Elyria* (1962), 174 Ohio St. 135, considered a fact situation remarkably analogous to the facts of this case regarding an annexation petition pending, but not completed, when by operation of law, the Township became a municipality.

In *Elyria, supra,* annexation petitions were filed under former Ohio statutes to annex a part of the Village of North Ridgeville to the City of Elyria. While the annexation was pending, the Village of North Ridgeville became a city by operation of law (Population exceeded 5,000). The court observed:

> The primary question in this cause is whether a change of status of a municipality from a village to a city during the pendency of a proceeding before the Board of County Commissioners for the annexation of a part of the territory of the village to an adjoining city divests the board of its jurisdiction of such proceeding. *Id.* at 135.

In a unanimous opinion, the Court determined that the Board of County Commissioners was divested of juris-

diction by the change of status during the pendency of the annexation proceeding. The Court reasoned:

> It must be noted that, although jurisdiction is lodged in the Board of County Commissioners in matters relating to the annexation of a part of village territory to a city, no jurisdiction exists in the board relating to an annexation proceeding concerning a part of city territory to another city. In fact, Section 709.35, Revised Code, and Sections 709.22 and 709.23, Revised Code, set up different procedures for these different situations. *Id.* at 138.

As a result, the court determined:

> The jurisdiction which attached when the proceeding was instituted was valid jurisdiction to conduct an annexation proceeding involving annexation of part of a village to a city. The subject matter over which the board had jurisdiction as to annexation related only to annexation of part of a village to a city and not as to part of a city to another city. When North Ridgeville changed its status, the subject matter of the annexation was changed also, and because of the statutory differences in the annexation proceedings the change of status of North Ridgeville from a village to a city divested the board of its jurisdiction over the subject matter, and any further action taken by the board would have been a nullity. *Id.*

It is Fred Mayer's position that the Ohio Supreme Court, if permitted the opportunity, would apply the same reasoning to this case.

Here, once the election results were certified the merger took place by operation of law, just as in *Elyria* once the census was reported.

As of January 1, 1986, by operation of law, at the will of the electors of Northampton and Cuyahoga Falls, the two became a new city. All territory formerly within the township became part of a Charter Municipal Corporation. There can be no doubt that as of January 1, 1986, the Fred Mayer property also became part of Cuyahoga Falls. As of December 31, 1985, Fred Mayer's land was still part of Northampton, and when Northampton ceased to exist, it became part of Cuyahoga Falls. That change of status, effected by operation of law, extinguished all authority to proceed with annexation, pursuant to Ohio law.

As in the *Elyria* case, there are statutory procedures for the annexation of territory within one municipality to another municipality. As in the *Elyria* case, because of the statutory differences in procedure the change of status divested the Akron City Council of its jurisdiction to act to accept the annexation. As a consequence, Akron City Council and the courts are without authority to act to conclude the annexations.

Summit County Council approved the Mayer annexation before merger occurred. Edward Davis, Clerk of Akron City Council, was stayed from presenting the matter to Akron City Council for approval or rejection. That stay is still in effect. The only authority for Akron City Council to act on the annexation petition is granted by R.C. 709.04. That authority exists only as to unincorporated territory. See *Holcomb v. Commissioners* (1980), 62 Ohio St. 2d 241. Because of the statutory differences in procedure the property's change in status to a municipal corporation divested Akron City Council of its jurisdiction, just as was the case in *Elyria*. Akron City Council's lack of authority to accept or reject the annexation is an abso-

lute bar to the completion of the Mayer annexation. Thus, if given the opportunity, the Ohio Supreme Court can reasonably be expected to declare that the fact of merger extinguished the annexation proceedings in this case.

The fact of merger does not render this case moot. The Ohio Supreme Court could not consider the effect of merger prior to its occurrence. As a result, if this Court fails to grant a petition for certiorari, the annexation will be pemitted to proceed, pursuant to the Ninth Ohio District Appeals Court's mandate to the Trial Court to enter final judgment for Akron.

The fact of merger is called to this Court's attention so that it may consider an alternative to a grant of certiorari. The U.S. Supreme Court has in appropriate cases granted review, summarily vacated the judgment below, and simultaneously remanded the case to the State Court below to consider federal or state grounds. *Louisiana v. Mora,* 423 U.S. 809; *Roundhouse Construction Co. v. Telesco Masons Supplies Co.,* 423 U.S. 809; *Pennsylvania v. Campana,* 414 U.S. 808.

Petitioner, Fred Mayer, respectfully urges the Court to consider such a disposition on the unique facts of this case.

CONCLUSION: RELIEF REQUESTED

Petitioners respectfully pray the Court grant the Petition for Certiorari to the Ohio Supreme Court, in order to review the questions raised herein, and in order that we may enjoy the opportunity to persuade the Court as to the correctness of our position on these issues. In the alternative, Petitioner urges this Court to grant review, summarily vacate the judgment below, and remand the matter to the Ohio Supreme Court to consider the probable adequate state grounds based on the merger of Petitioner's property with the City of Cuyahoga Falls, which merger occurred subsequent to the Ohio Supreme Court's decision below.

Respectfully submitted,

ALFRED E. SCHRADER, *Counsel of Record*
441 Wolf Ledges Parkway
Suite 400
Akron, Ohio 44311-1054
Phone: (216) 762-0765
Attorney for Petitioner-Property Owner Fred Mayer

April 3, 1986

APPENDIX

JOURNAL ENTRY OF THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO GRANTING MOTION TO STAY

(Filed December 16, 1985)

C.A. NO. 12090

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

State of Ohio)
) ss
Summit County)

FRED MAYER,
Plaintiff,

vs.

EDWARD DAVIS, *et al.*,
Defendants.

JOURNAL ENTRY

This cause was heard upon the motion of Plaintiff Fred Mayer to stay execution of the judgment entered in C.A. No. 12090 pending appeal to the Supreme Court of the United States.

Upon consideration thereof, the Court finds that the motion is conditionally granted.

It is ORDERED that execution of the judgment in C.A. No. 12090 will be stayed effective upon the filing of

the notice of appeal in accordance with United States Supreme Court Rule 10.

/s/ EDWARD J. MAHONEY
Presiding Judge
/s/ DANIEL B. QUILLEN
Judge

cc: Alfred E. Schrader, Attorney at Law, 411 Wolf Ledges Pkwy., Suite 401, Akron, OH 44311 for Plaintiff.

Patricia Ambrose, Asst. Law Director, 161 S. High St., Akron, OH 44308 for Defendants.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY AND DISMISSING APPEAL

(Dated December 4, 1985)

Case No. 85-1582

THE SUPREME COURT OF OHIO
Columbus

FRED MAYER,
Appellant,

v.

EDWARD DAVIS *et al.*,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Summit County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Alfred E. Schrader.

/s/ FRANK D. CELEBREZZE
Chief Justice

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO

(Dated August 28, 1985)

C.A. NO. 12090

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

State of Ohio)
) ss:
County of Summit)

FRED MAYER,
Plaintiff-Appellee,

v.

EDWARD DAVIS, Clerk of Akron City Council, *et al.*,
Defendants-Appellants.

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MAHONEY, *P. J.*

Appellant Edward Davis, Clerk of Akron City Council, appeals an order of Summit County Court of Common Pleas granting a R.C. 709.07 injunction against annexation in favor of appellee, property owner, Fred Mayer. We reverse.

Fred Mayer and David Meeker owned as equal partners 1.033 acres of land known as 1862 Akron-Peninsula Road in Northampton Township. Both parties signed a petition on February 9, 1984, requesting annexation of the property to the City of Akron. Summit County Council held a public hearing on the petition as required by R.C. 709.031 on June 4, 1984, and approved the annexation on December 17, 1984, in Resolution No. 84-726.

Fred Mayer and David Meeker dissolved their partnership in October of 1984. On January 11, 1985, Mayer, by purchase of Meeker's interest, became the sole owner of the property. He then instituted the present action pursuant to R.C. 709.07 to enjoin Edward Davis for presenting the 1.033 acre annexation petition to Akron City Council for approval.

Upon statements of council, testimony of witnesses, and admissions of exhibits, the trial court found that Mayer had established by clear and convincing evidence that he had a legal right and interest that would be adversely affected by the annexation and that there was error in the proceedings before Summit County Council, in that council failed to grant or deny the petition for annexation within ninety days from the public hearing on the petition. Satisfied that Mayer had met the requirements of R.C. 709.07, the trial court granted an injunction that prevented the annexation of the property to the City of Akron.

ASSIGNMENT OF ERROR

"The common pleas court erred in finding that there was error in the annexation proceedings before council in that county council failed to deny or grant the annexation petition within ninety days after the public hearing."

R.C. 709.033 authorizes the Board of County Commissioners to hear and determine annexation petitions. Subsection E of that section specifically directs that, "[T]he * * * commissioners shall grant or deny the petition for annexation within ninety days after the hearing set pursuant to Section 709.031 of the Revised Code." This court in an earlier decision, *Pfister v. Bd. of Commrs. of Summit Cty.* (Mar. 26, 1986), Summit App. No. 9490, unreported, interpreted the ninety day limit as being directory rather than mandatory. Thus, the board retains its statutory authority to consider an annexation petition even if more than ninety days should elapse following the public hearing. The purpose of the provision is to place a duty on the board to either grant or deny the petition within the ninety day period while permitting an action in mandamus to compel the board to take such action if it has failed to do so within the allotted time period. *Garverick v. Hoffman* (1969), 20 Ohio Misc. 34, 37-38, affirmed (1970), 23 Ohio St. 2d 74. The Ohio Supreme Court has more recently reaffirmed this position. In *Holcomb v. Bd. of Commrs.* (1980), 62 Ohio St. 2d 241, it upheld the issuance of a writ of mandamus even though the statutory time limits had expired.

It appears that Summit County Council retains the statutory authority to decide annexation petitions beyond the ninety day time period. County Council therefore committed no error for the purposes of R.C. 709.033 when it granted Fred Mayer's petition for annexation of his 1.033 acres of property in Northampton Township to the City of Akron more than ninety days after it held a public hearing on the matter.

It further appears that Fred Mayer is not entitled to enjoin Edward Davis from presenting the annexation

petition to Akron City Council for approval. R.C. 709.07 requires one petitioning for injunctive relief to make a two-fold showing. First, the petitioner must demonstrate by clear and convincing evidence that his legal interests or rights would be adversely affected by the annexation. Mayer has satisfied this first requirement by his showing that the annexation would cause him to pay higher taxes, would make his property more difficult to lease, and would cause him to lose those tenants presently leasing his property.

Secondly, R.C. 709.07 requires the petitioner to demonstrate error in the annexation proceedings. As indicated above county council committed no error in delaying the annexation decision beyond the ninety day time period. Since Mayer has shown no other error in the annexation proceedings before county council, he has failed to satisfy this second requirement. Mayer is consequently not entitled to the injunctive relief afforded under R.C. 709.07.

SUMMARY

The assignment of error is sustained and this cause remanded to the common pleas court to enter final judgment for the appellant, City of Akron.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it

shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

/s/ EDWARD J. MAHONEY
Presiding Judge for the Court

QUILLIN, *J.*
BAIRD, *J.*
concur

COURT OF COMMON PLEAS INJUNCTION

(Filed March 8, 1985)

Case No. 85 1 6312

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

FRED H. MAYER,
Plaintiff,

vs.

PATRICIA AMBROSE, *et al.*,
Defendants.

INJUNCTION

This matter came on for hearing before the Court on February 21, 1985, and the Court Orders that:

Pursuant to ORC 709.07, the Court hereby enjoins and restrains the Defendant, Ed Davis, the City of Akron, Ohio, et al, and all of its officials, officers, agents, employees, or contractors, the Akron City Council Clerk, from presenting to the City Council of Akron, Ohio, the annexation petition for the annexation of 1.033 acres of land in Northampton Township, Ohio, and further restrains the Akron City Council from acting on the annexation petition for 1.033 acres of land in Northampton Township.

This Order may be effective if served personally or communicated verbally by Plaintiff's counsel on any of Defendant's agents.

Costs to Defendants.

IT IS SO ORDERED.

/s/ MARY F. SPICER
Judge

FINDING AND ORDER OF THE COURT OF COMMON PLEAS

(Filed February 26, 1985)

Case No. CV 85 1 0312

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

FRED MAYER,
Plaintiff,

vs.

ED DAVIS, CLERK, *et al.*,
Defendants.

FINDING AND ORDER

On February 21, 1985, the matter of the Complaint for Statutory Injunctive Action, filed January 31, 1985 by Fred Mayer, against Ed Davis, Clerk of Akron City Council, et al., came on for hearing. All parties of interest were represented by counsel, Fred Mayer by Attorney Al Schrader and the Defendants by Agent and Prosecutor Patricia Ambrose and Attorney Max Rothal.

Upon statements of counsel, testimony of witnesses, exhibits admitted and briefs and memorandum filed, the Court finds as follows:

(1) On February 9, 1984 a petition seeking annexation of 1.033 acres of land known as 1862 Akron-Peninsula Road in Northampton Township to the City of Akron was filed.

(2) On February 4, 1984 the 1.033 acres was owned by equal partners, Fred Mayer and David Meeker. Both partners signed the petition.

(3) On June 4, 1984, pursuant to law, a public hearing was held.

(4) On December 17, 1984 the resolution to approve the annexation was passed by County Council.

(5) In October, 1984 Mayer and Meeker dissolved the partnership. On January 11, 1985 Fred Mayer, by purchase, became sole owner of 1862 Akron-Peninsula Road.

(6) On January 31, 1985 Fred Mayer filed this action under O.R.C. 709.07 seeking injunctive relief.

The Court further finds that petitioner, Fred Mayer, is an interested party under O.R.C. 709.07 and that he showed by clear and convincing evidence his legal right and interest would be adversely affected by annexation and further that there was error in the proceeding before the Board of County Commissioners pursuant to O.R.C. Section 709.032 et seq. in that council failed to grant or deny the annexation within the 90 day requirement.

The injunctive relief sought herein is hereby granted.

MARY F. SPICER
Judge

AFFIDAVIT OF FRED H. MAYER

(Dated February 15, 1985)

Case No. 85 1 0312

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO
JUDGE SPICER

FRED H. MAYER,
Plaintiff,

vs.

ED DAVIS, *et al.*,
Defendants.

AFFIDAVIT OF FRED H. MAYER

I, FRED H. MAYER, being first duly sworn according to law, do hereby depose and say that:

1. I am the Plaintiff in the above-captioned matter.

2. The proposed annexation adversely affects my legal rights and interests as follows:

(a) I am the owner of the property to be annexed and I do not desire the property to be annexed;

(b) Annexation will result in higher taxes and costs to me with no corresponding increase in services;

(c) The annexation will make my property more difficult to lease. Current tenants have indicated they

would not be interested in continuing their tenancy if the property is annexed;

(d) If a stay pending further proceedings is not granted and if the injunction against annexation pursuant to 709.07 is not ultimately granted on the merits, then my land will be annexed by City Council and to avoid the annexation will become moot. In the absence of a stay order, this action will become moot and will result in great irreparable harm to my interest as landowner of the property.

3. The nature of the error in the proceedings before Summit County Council is that Summit County Council failed to act within the required time limit of Ordinance 83-226, Section 1 (m) which requires County Council to ". . . grant or deny the petition for annexation within ninety (90) days after the hearing pursuant to subsection (e) of this ordinance."

4. Because of the long delay between the hearing and the final decision of Summit County Council, I had assumed that this annexation matter was over with. No communication otherwise was given to me personally by the agent for petitioners or any other party.

5. I learned only in early January when I was notified by the Akron City Planning Commission of a hearing as to how my land ought to be zoned once it was annexed to the City of Akron. Attached and incorporated herein by reference, marked as Exhibit "A", is a copy of that notice.

6. Immediately upon receipt of that notice, I took steps to attempt to avoid the annexation including the attached marked Exhibit "B", incorporated herein by

reference, a copy of my letter to the Planning Commission indicating my desire to not have the property annexed.

7. Substantial change in circumstance occurred between the time in early 1984 when I signed the annexation petition and early 1985 when I discovered that the land had been approved for annexation by Summit County Council. These changes include the following:

(a) My business relationship with Mr. Meeker terminated;

(b) I became the sole owner of the property to be annexed;

(c) As a result of the split in our public relations firm, space became available in the building for rent to others;

(d) I discovered that it would be more difficult to rent space in the building if the land is annexed;

(e) Current tenants indicated that they would cease their tenancy if the land was annexed;

(f) I discovered that the taxes would increase if the land was annexed;

(g) I discovered that services would not be significantly increased if the land were annexed.

8. In addition, during this time period, Northampton Township and the City of Cuyahoga Falls formed a merger commission to consider merging the two communities. I would much rather my land be located in the City of Cuyahoga Falls than in the City of Akron. This option would be forever denied to me if the land is annexed to the City of Akron.

9. I do not desire that my land be annexed to the City of Akron and I have brought this action in order to avoid my land being annexed.

10. All of the above is within my personal knowledge and belief.

Further affiant sayeth naught.

/s/ FRED H. MAYER
Fred H. Mayer

SWORN to before me by the said FRED H. MAYER this 15 day of February, 1985.

/s/ AL SCHRADER
Notary Public
Al Schrader, Attorney-At-Law
Notary Public - State of Ohio

My commission has no expiration date
Sec. 147.03 R.C.

OHIO REVISED CODE

§ 709.01 Annexation and detachment of territory.

Territory may be annexed to, or detached from, municipal corporations, in the manner provided in sections 709.01 to 709.47 of the Revised Code. No territory lying within the boundaries of a military base, camp, or similar installation under the jurisdiction of a military department of the United States government, that is used for the housing of members of the armed forces of the United States and is a center for military operations of the department shall be annexed to a municipal corporation under sections 709.01 to 709.21 of the Revised Code without the approval of the secretary of defense of the United States, his designee, or other person having authority under federal law to give such approval.

[§ 709.01.1] § 709.011 Duties of Clerks; notification to board of elections.

The clerk or clerk of council of a municipal corporation shall notify the board of elections of all vacancies caused by death, resignation, or otherwise in the elective offices of the municipal corporation. Such notification shall be made in writing and filed not later than ten days after the vacancy occurs with the board of elections of the county or counties in which the municipal corporation is located.

The clerk or clerk of council of a municipal corporation shall notify the board of elections of all changes in the boundaries of the municipal corporation. Such notification shall be made in writing and contain a plat clearly showing all boundary changes and shall be filed

with the board of elections of the county or counties in which the municipal corporation is located within thirty days after such change occurs.

[§ 709.01.2] § 709.012 [Reduction in number of township firemen; order of dismissal; priority for employment in municipal fire department.]

When a municipal corporation annexes township territory which results in a reduction of the firefighting force of the township or joint township fire district, the reduction shall be made by dismissal of firemen in the inverse order of seniority with the employee with least time of service being dismissed first. The annexing municipal corporation shall offer employment in the inverse order of dismissal by the township to such firemen if a vacancy exists in the municipal fire department and if they:

(A) Were full-time paid active members of the township or joint township firefighting force for at least six months prior to dismissal and have made application to the municipal corporation within sixty days after the effective date of dismissal;

(B) Have passed a physical examination as prescribed by the physician of the annexing municipal corporation and meet the requirements necessary to perform firefighting duties;

(C) Meet minimum standards of the municipal corporation with respect to moral character, literacy, and ability to understand oral and written instructions as determined by an interview conducted by the fire department of the municipal corporation. The applicant shall be at least twenty-one years of age on the date of his application.

(D) Are able to qualify for membership in the police and firemen's disability and pension fund.

If no vacancy exists in the municipal fire department at the time of the application referred to in division (A) of this section, the application shall be held until a vacancy occurs. When such a vacancy occurs, the applicant shall be entitled to employment in acordance with the requirements of divisions (A), (B), (C), and (D) of this section. So long as any application for employment has been made and is being held under this section, the municipal corporation shall not fill any vacancy in its fire department by original appointment. If there are individuals who are entitled to reinstatement in the municipal fire department and the vacancies therein are insufficient to permit both such reinstatements and employment of all those applying for employment under division (A) of this section, the persons having the greatest length of service, whether with the municipal or township fire department, shall be entitled to fill the vacancies as they occur.

A person employed under this section, upon his acceptance into the municipal fire department, shall be given the rank of "firefighter" and entitled to full seniority credit for his prior service in the township or joint township fire district. He shall be entitled to the same salary, future benefits, vacations, earned time, sick leave, and other rights and privileges as the municipal fire department extends to other employees with the same amount of prior service. He may take promotional examinations only after completion of one year of service with the municipal fire department and after meeting any applicable civil service requirements for such examination.

Compliance with this section is in lieu of compliance with section 124.42 of the Revised Code or any other

requirements for original appointment to a municipal fire district.

§ 709.02 Annexation of adjacent territory; petition; owner defined.

The owners of real estate adjacent to a municipal corporation may, at their option, cause such territory to be annexed thereto, in the manner provided by sections 709.03 to 709.11 of the Revised Code. Application for such annexation shall be by petition, addressed to the board of county commissioners of the county in which the territory is located, and signed by a majority of the owners of real estate in such territory. Such petition shall contain:

(A) A full description and accurate map or plat of the territory sought to be annexed;

(B) A statement of the number of owners of real estate in the territory sought to be annexed;

(C) The name of a person or persons to act as agent for the petitioners.

As used in sections 709.02 to 709.21 and 709.38 and 709.39 of the Revised Code, "owner" or "owners" means any adult individual seized of a freehold estate in land who is legally competent and any firm, trustee, or private corporation that is seized of a freehold estate in land; except that individuals, firms, and corporations holding easements are not included within such meanings; and no person, firm, trustee, or private corporation that has become an owner of real estate by a conveyance the primary purpose of which is to affect the number of owners required to sign an annexation petition is included within such meanings.

§ 709.03 Petition presented to board of county commissioners; proceedings.

The petition required by section 709.02 of the Revised Code shall be filed in the office of the board of county commissioners and the clerk shall cause the petition to be entered upon the record of proceedings of the board, which entry shall be the first official act of the board on the annexation petition, and shall cause the petition to be filed in the office of the county auditor, where it shall be subject to the inspection of any interested person. The agent for the petitioners shall cause written notice of the filing of the petition with the board of county commissioners and the date of such filing to be delivered to the clerk of the legislative authority of the municipal corporation to which annexation is proposed and to the clerk of each township any portion of which is included within the territory sought to be annexed. Any person who signed the petition for annexation may remove his signature by filing with the clerk of the board of county commissioners a written notice of withdrawal of his signature within twenty days after such a notice of filing is delivered to the clerk of the township in which he resides. Thereafter signatures may be withdrawn or removed only in the manner authorized by section 709.032 [709.03.2] of the Revised Code.

[§ 709.03.1] § 709.031 Fixing time for hearing; review of map.

The board of county commissioners shall set the time and place for hearing the petition, which time shall be not less than sixty nor more than ninety days after the petition is filed in the office of the county auditor, and shall immediately notify the agent of the petitioners of

such time and place. The agent for the petitioners shall cause a notice containing the substance of the petition, and the time and place where it will be heard, to be published once a week for a period of four consecutive weeks in a newspaper of general circulation in the county prior to the time fixed for the hearing, and shall deliver a copy of the notice to the clerk of each township any portion of which is included within the territory sought to be annexed and to the clerk of the legislative authority of the municipal corporation to which annexation is proposed.

The board of county commissioners may, at any time prior to thirty days before the date so fixed for the hearing, refer the description and the map or plat of the territory sought to be annexed to the county engineer for a report upon the accuracy thereof. When so referred to him, the engineer shall, at or before the hearing, make a report in writing to the board upon his findings, which shall not be conclusive upon the board, and failure of the engineer to make his report shall not affect the jurisdiction or duty of the board to proceed.

[§ 709.03.2] § 709.032 Hearing, testimony, and amendments.

The hearing provided for in section 709.031 [709.03.1] of the Revised Code shall be public. Any person may appear, in person or by attorney, and support or contest the granting of the prayer of the petition provided for by section 709.02 of the Revised Code. Affidavits presented in support of or against the prayer of such petition shall be considered by the board.

At the hearing any owner who signed the petition for annexation may appear, and after being sworn as

provided by section 305.21 of the Revised Code, testify orally that his signature was obtained by fraud, duress, misrepresentation, or undue influence. Any person may testify orally after being so sworn in support or rebuttal to such prior testimony by the owner. The commissioners, the agent for the petitioners or his attorney, and such owner or his attorney may examine such witnesses, including the owner. If a majority of the county commissioners find that such signature was obtained under circumstances that did constitute fraud, duress, misrepresentation, or undue influence, they shall find the signature to be void, and shall order it removed from the petition as of the time the petition was filed.

The petition may be amended without further notice by leave of the county commissioners with the consent of the agent for the petitioners where such amendment does not add to the territory embraced in the original petition. If any amendment is permitted, whereby territory not before embraced is added, the board shall appoint another time for the hearing, of which notice shall be given as specified in section 709.031 [709.03.1] of the Revised Code.

[§ 709.03.3] § 709.033 Order for annexation.

After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if it finds that:

(A) The petition contains all matter required in section 709.02 of the Revised Code.

(B) Notice has been published as required by section 709.031 [709.03.1] of the Revised Code.

(C) The persons whose names are subscribed to the petition are owners of real estate located in the territory

in the petition, and as of the time the petition was filed with the board of county commissioners the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed.

(D) The territory included in the annexation petition is not unreasonably large; the map or plat is accurate; and the general good of the territory sought to be annexed will be served if the annexation petition is granted.

The board of county commissioners shall grant or deny the petition for annexation within ninety days after the hearing set pursuant to section 709.031 [709.03.1] of the Revised Code.

If the board of county commissioners grants the petition for annexation it shall enter on its journal all the orders of the board relating to the annexation and deliver a certified transcript of all orders of the board, signed by a majority of the members of the board, the petition, map, and all other papers on file relating to the annexation proceedings to the auditor or clerk of the municipal corporation to which annexation is proposed.

§ 709.04 Acceptance of territory by annexing municipal corporation.

At the next regular session of the legislative authority of the municipal corporation to which annexation is proposed, after the expiration of sixty days from the date of filing with him as required by section 709.033 [709.03.3] of the Revised Code, the auditor or clerk of such municipal corporation shall lay the transcript and the accompanying map or plat and petition required by such section before the legislative authority. Thereupon the legislative authority, by resolution or ordinance, shall accept or reject

the application for annexation. If the legislative authority fails to pass an ordinance or resolution accepting the application for annexation within a period of one hundred twenty days after the transcript is laid before it by the auditor or clerk, the application for annexation shall be deemed rejected by the legislative authority, unless it has been prevented from acting by a temporary restraining order, a temporary injunction, or some other order of a court.

§ 709.05 Rejection of application; effect. (GC § 3551)

If the resolution or ordinance required by section 709.04 of the Revised Code is a rejection of the application for annexation, no further proceedings shall be had. Such rejection shall not be a bar to application thereafter to the board of county commissioners on the same subject.

§ 709.06 Proceedings when application allowed.

If the resolution or ordinance required by section 709.04 of the Revised Code is an acceptance of the proposed annexation, the auditor or clerk of the municipal corporation to which annexation is proposed shall make three copies, containing the petition, the map or plat accompanying the petition, a transcript of the proceedings of the board of county commissioners, and resolutions and ordinances in relation to the annexation, with a certificate to each copy that it is correct. Such certificate shall be signed by the auditor or clerk in his official capacity, and shall be authenticated by the seal of the municipal corporation if there is any. The auditor or clerk shall forthwith deliver one such copy to the county auditor and one such copy to the county recorder, who shall make a record

thereof in the proper book of records and file and preserve it. The other copy shall be forwarded by the auditor or clerk to the secretary of state.

§ 709.07 Injunction against annexation.

(A) Within sixty days from the filing of the papers relating to the annexation with the auditor or clerk as provided by division (D) of section 707.04 or by section 709.033 [709.03.3] of the Revised Code, any person interested, and any other person who appeared in person or by an attorney in the hearing provided for in section 709.031 [709.03.1] of the Revised Code, may make application by petition to the court of common pleas praying for an injunction restraining the auditor or clerk from presenting the annexation petition and other papers to the legislative authority. The petition of a person interested shall set forth facts showing:

(1) How the proposed annexation adversely affects the legal rights or interests of the petitioner;

(2) The nature of the error in the proceedings before the board of county commissioners pursuant to section 707.04, 709.032 [709.03.2], or 709.033 [709.03.3] of the Revised Code, or how the findings or order of the board is unreasonable or unlawful.

The petition of any other person shall set forth facts applicable to division (A)(2) of this section.

(B) The petition shall be filed and docketed in the office of the clerk of the court of common pleas, naming the auditor or clerk of the municipal corporation to which annexation is proposed and the agent of the petitioners for annexation as defendants, and summons shall be served in the manner provided in Chapter 2703. of the Revised

Code. The auditor or clerk shall not present the annexation application to the legislative authority, and it shall not take any action thereon, until after the final hearing and disposition of such petition if an order staying further proceedings on the annexation is entered by the court of common pleas or a judge thereof and served upon the auditor or clerk.

(C) The court of common pleas shall hear the petition not less than twenty days from the filing thereof, and at the hearing the court may hear evidence upon the matters averred in the petition.

(D) The petition for injunction shall be dismissed unless the court finds the petitioner has shown by clear and convincing evidence that the annexation would adversely affect the legal rights or interests of the petitioner, and that:

(1) There was error in the proceedings before the board of county commissioners pursuant to section 709.032 [709.03.2] or 709.033 [709.03.3] of the Revised Code, or that the board's decision was unreasonable or unlawful; or

(2) There was error in the findings of the board of county commissioners or in the election or certification by the board of elections of the results of the election held pursuant to division (D) of section 707.04 of the Revised Code.

(E) If the court finds all the matters required in divisions (D)(1) and (2) of this section it shall make an order enjoining the auditor or clerk of the annexing municipal corporation from presenting the annexation application and related papers to the legislative authority. Such order shall not be a bar to subsequent applications to the board of county commissioners for the purpose of

annexing the territory involved in the annexation application. The court shall render such judgment as to the payment of the costs incurred in the proceedings of injunction as is just and equitable.

§ 709.08 Proceedings when petition dismissed.

If the court of common pleas makes an order dismissing the petition to enjoin further proceedings, the clerk of the court of common pleas shall immediately forward a certified copy of such order to the auditor or clerk of the municipal corporation, who, at the next regular meeting of the legislative authority, shall lay such transcript, map or plat, and the accompanying petition before such legislative authority, as if no petition had been so presented to the court.

§ 709.09 Proceedings when injunction allowed. (GC § 3555)

If the court of common pleas enjoins the auditor or clerk of a municipal corporation from making the report to the legislative authority, a certified copy of the order enjoining the report shall immediately be forwarded by the clerk of the court of common pleas to the auditor or clerk of the municipal corporation, who shall file it with the transcript, map or plat, and petition, and preserve it in his office, and thereupon no further proceedings shall be had in the matter. The order of the court shall not operate as a bar to any applications thereafter to the board of county commissioners for such purpose.

§ 709.10 Effective date and rights of inhabitants.

The annexation shall become effective thirty days after the passage of the resolution or ordinance by the

legislative authority of the municipal corporation accepting annexation, provided that if the resolution or ordinance is subjected to a referendum, the annexation, if approved by the electors, shall become effective thirty days after such approval. The territory annexed is a part of the municipal corporation, and the inhabitants residing therein shall have all the rights and privileges, and shall be subject to the powers, of the municipal corporation as are the inhabitants within the original limits of such municipal corporation.

§ 709.43 "Merger" defined.

As used in sections 709.43 to 709.48 of the Revised Code, "merger" means the annexation, one to another, of existing municipal corporations or of the unincorporated area of a township with a municipal corporation located adjacent to or wholly or partly within that township.

§ 709.44 [Territory of municipalities or unincorporated area of township may be merged.]

The territory of one or more municipal corporations, whether or not adjacent to one another, may be merged with that of an adjacent municipal corporation, and the unincorporated area of a township may be merged with a municipal corporation located adjacent to or wholly or partly within the township, in the manner provided in sections 709.43 to 709.48 of the Revised Code.

§ 709.45 Petition; submission to electors; commission to set conditions.

A petition may be filed with the board of elections proposing that one or more municipal corporations be merged with another municipal corporation, or that the

unincorporated area of a township be merged with a municipal corporation located adjacent to or wholly or partly within the township, as provided by section 709.44 of the Revised Code. Such petition may be presented in separate petition papers. Each such petition paper shall contain, in concise language, the purpose of the petition and the names of not less than five electors of each such municipal corporation, or the names of not less than five electors of the unincorporated area of such township and the names of not less than five electors of the municipal corporation located adjacent to or wholly or partly within the township, to be nominated to serve as commissioners. The petition shall be governed by the rules of section 3501.38 of the Revised Code. Such petition shall contain signatures of electors of each municipal corporation or of the unincorporated area of the township proposed to be merged and signatures of electors of the municipal corporation with which merger is proposed, numbering not less than ten per cent of the number of electors residing in each such political subdivision who voted for the office of governor at the next preceding general election for such office. Such petition shall be filed with the board of elections of the county in which the largest portion of the population of the municipal corporation with which merger is proposed resides. Such board of elections shall cause the validity of all signatures to be ascertained and in doing so may require the assistance of boards of elections of other counties as the case requires. If the petition is sufficient, the board of elections of the county in which the petition is required to be filed shall submit the question: "Shall a commission be chosen to draw up a statement of conditions for merger of the political subdivisions of ....., ..., and .....?" for the approval or rejection of the

electors of each political subdivision proposed to be merged and the electors of the municipal corporation to which merger is proposed at the next general election, in any year, occurring subsequent to the period ending seventy-five days after the filing of such petitions with the board. Provision shall be made on the ballot for the election, from each of the component political subdivisions, of five electors who shall constitute the commission to draw up the statement of conditions for merger of the political subdivisions. If any of the political subdivisions for which merger is proposed are located wholly or partially in a county other than the one in which the petition is required to be filed, the board of elections of the county in which such petition is filed shall, if the petition is found to be sufficient, certify the sufficiency of such petition and the statement of the issue to be voted on to the boards of elections of such other counties, the boards of elections of such other counties shall submit the question of merging and the names of candidates to be elected to the commission to draw up the statement of conditions for the approval or rejection of the electors in the portions of such political subdivisions within their respective counties, and upon the holding of such election, shall certify the result thereof to the board of elections of the county in which the petition is required to be filed.

§ 709.46 Commission meetings; conditions submitted to electors.

If the question of merging a municipal corporation and the unincorporated territory of a township, as provided in section 709.45 of the Revised Code, is disapproved by a majority of those voting on it in the township proposed to be merged or in the municipal corporation with which merger is proposed, no further petitions shall be filed under

that section proposing the same merger for at least three years after the date of such disapproval. If the question of merging as provided in section 709.45 of the Revised Code is approved by a majority of those voting on it in each political subdivision proposed to be merged and in the municipal corporation with which merger is proposed, the five candidates from each such political subdivision shall be elected to the commission to formulate the conditions of merging the political subdivisions. The first meeting of such commission shall be held in the chamber of the legislative authority of the municipal corporation which has the smallest population, or in the case of a merger of the unincorporated area of a township and a municipal corporation located adjacent to or wholly or partly within the township in the office of the board of township trustees, at nine a.m. on the tenth day after the certification of the election by the last of the respective boards of elections to make such certification, unless such day is a Saturday, Sunday, or holiday, in which case such first meeting shall be held on the next day thereafter which is not a Saturday, Sunday, or holiday. The clerk of the municipal legislative authority or of the board of township trustees in whose chamber or office the first meeting of the commission is held shall serve as temporary chairman until permanent officers are elected. The commission shall elect its own permanent officers and shall proceed to meet as often as necessary to formulate conditions for merger that are satisfactory to a majority of the members of such commission from each political subdivision. All meetings of a merger commission shall be subject to the requirements of section 121.22 of the Revised Code. The conditions of merger may provide for the election, prior to the merger, of new officers to govern the municipal corporation with which merger is proposed after

the merger is complete, provided that such a provision does not conflict with the charter of the municipal corporation with which merger is proposed. In the case of a merger of a township and a municipal corporation, the merger conditions may also provide for the annexation of a school district located wholly within the township to the school district of the municipal corporation. As soon as the conditions have been agreed upon by a majority of the members of the commission from each political subdivision, this fact shall be reported to the board of elections of each of the counties in which the political subdivisions proposed for merger are located and the question shall be submitted to the voters at the next general election occurring after the commission is elected. Regardless of whether a merger commission of a township and a municipal corporation succeeds in reaching agreement, the commission shall cease to exist on the seventy-fifth day prior to the next general election after the commission is elected. The boards of elections shall submit the conditions of proposed merger for the approval or rejection of the electors in the portions of such political subdivisions within their respective counties and, upon the holding of such election, shall certify the results thereof to the board of elections of the county in which the petition is required to be filed.

§ 709.47 Effective date; form of government; succession to interests.

If the conditions of merger agreed upon by a merger commission of a township and a municipal corporation are disapproved by a majority of those voting on them in the township proposed to be merged or in the municipal corporation with which merger is proposed, no further petitions shall be filed under section 709.45 of the Revised Code proposing the same merger for at least three years

after the date of such disapproval. If the conditions of merger are approved by a majority of those voting on them in each political subdivision proposed to be merged and in the municipal corporation with which merger is proposed, the merger is effective on the first day of January of the year following the certification of the results of the election by the board of elections with which the petition is required to be filed, unless the conditions specify a different date, in which case the date specified is the effective date of merger. On and after such effective date the territory of each political subdivision proposed to be merged is annexed to and included in the territory and corporate boundaries of the municipal corporation with which the merger is proposed. The form of government, ordinances, resolutions, and other rules of the municipal corporations with which merger is proposed apply throughout such newly included territories to the extent they are not in conflict with the conditions approved by the electors. The charter, if any, of the municipal corporation with which merger is proposed applies throughout the newly included territories. The corporate existence and the offices of the municipal corporations or of the township proposed to be merged terminate on such date. The municipal corporation with which merger is proposed succeeds to the interests of the political subdivision proposed to be merged in:

(A) All moneys, taxes and special assessments, whether such moneys, taxes, or special assessments are in the treasury, or in the process of collection;

(B) All property and interests in property, whether real or personal;

(C) All rights and interests in contracts or in securities, bonds, notes, or other instruments;

(D) All accounts receivable and rights of action;

(E) All other matters not included in division (A), (B), (C), or (D) of this section.

On and after such date the municipal corporation with which merger is proposed is liable for all outstanding franchises, contracts, debts, and other legal claims, actions, and obligations of the political subdivision proposed to be merged.

§ 709.48 [Effect of petition for merger of a municipality and unincorporated area of township.]

On and after the date on which a petition is filed with the board of elections under section 709.45 of the Revised Code for the election of a merger commission for the merger of a municipal corporation and the unincorporated territory of a township, no petition for the annexation of any part of the unincorporated territory of the township shall be filed with a board of county commissioners under section 709.03 or 709.15 of the Revised Code, until one of the following occurs:

(A) The question of forming a merger commission is defeated at the election provided for under section 709.45 of the Revised Code by a majority of the electors of either the municipal corporation or the unincorporated territory of the township in which the election is held.

(B) The merger commission elected pursuant to section 709.45 of the Revised Code fails to reach agreement on conditions of merger no later than the seventy-fifth day prior to the next general election after the commission was elected.

(C) The conditions of merger agreed upon by the merger commission are defeated by a majority of the electors of either the municipal corporation or the unincorporated territory of the township in which the election on the conditions is held.

SUMMIT COUNTY COUNCIL RESOLUTION NO. 84-726

DISTRIBUTION
Executive - 3
Auditor
County Prosecutor
Clerk of Council - Akron
Agent for Petitioners

RESOLUTION NO. 84-726

Northampton Township
Planning & Economic Dev.
Engineer

SPONSOR Mrs. Ceravolo

Environmental Services
File

DATE December 17, 1984

A RESOLUTION APPROVING THE ANNEXATION OF 1.033 ACRES OF LAND IN NORTHAMPTON TOWNSHIP TO THE CITY OF AKRON AND DECLARING AN EMERGENCY.

WHEREAS, a petition for annexation was filed by Patricia C. Ambrose, agent for petitioners, on February 9, 1984, pursuant to Ohio Revised Code Sections 709.02 and 709.03 requesting the annexation of certain land in Northampton Township to the City of Akron; and

WHEREAS, Agent for Petitioners moved the Council to delete territory pursuant to Ohio Revised Code Section 709.032; and

WHEREAS, the deletion encompassed portions of the County road fronting on the two adjoining properties and reduced the territory from 1.5 acres to 1.033 acres; and

WHEREAS, this amendment was made with the concurrence of the attorney for the Northampton Township Trustees and with the approval of County Council; and

WHEREAS, no opposition appeared in person or by affidavit at the public hearing; and

WHEREAS, a public hearing was held on June 4, 1984 after regular 5:30 County Council meeting, testimony was presented by the proponents and opponents of this annexation petition; now

THEREFORE, BE IT RESOLVED by the Council of the County of Summit:

SECTION 1

Acting in accordance with Section 709.033 of the Ohio Revised Code, the Council finds the following:

A. The petition contains all matters required in Section 709.02 of the Revised Code.

B. The notice was published as required by Section 709.031 of the Ohio Revised Code.

C. The persons whose names are subscribed to the petition are owners of real estate in the territory included in the petition; as of the time the petition was filed with the County Council, the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed.

D. The territory included in the annexation petition is not unreasonably large.

E. The map and legal description are accurate.

F. The general good of the territory sought to be annexed will be served if the annexation petition is granted.

SECTION 2

In accordance with Ohio Revised Code Section 709.033, the petition for annexation of 1.033 acres of land in Northampton Township to the City of Akron is hereby granted. The property is more fully described in Exhibit "I" which is attached hereto and made a part of this resolution as if fully rewritten.

SECTION 3

All of the orders of the Council of the County of Summit relating to this annexation shall be entered on the journal; a certified transcript of all orders signed by a majority of the members of the County Council and all orders enacted by the County Council, the petition, map and all other papers on file relating to the annexation shall be delivered to the Clerk of Akron City Council.

SECTION 4

This resolution is hereby declared an emergency so that the affected property owners may receive municipal services at the earliest possible date and for the reason that this resolution is in the best interests of the health, safety and welfare of the citizens of the County of Summit.

SECTION 5

Provided this resolution receives the affirmative vote of five members, it shall take effect immediately upon its adoption and approval by the Executive; otherwise, it

shall take effect and be in force at the earliest time provided by law.

INTRODUCED December 17, 1984

ADOPTED December 17, 1984

/s/ (Illegible)
Clerk of Council

/s/ (Illegible)
President of Council

Approved 12-18-84

Executive (Illegible)

Enacted Effective December 18,1984

On roll call: Seven affirmative votes: unanimous.

Supreme Court, U.S.
FILED
APR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1627

In The
Supreme Court of the United States
October Term, 1985

FRED MAYER,

Petitioner,

vs.

EDWARD DAVIS, CLERK OF AKRON CITY COUNCIL
and PATRICIA C. AMBROSE,
Agent for Annexation Petitioners,

Respondents.

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

HAROLD K. STUBBS
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COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED FOR REVIEW

DO THE DUAL REQUIREMENTS OF OHIO REVISED CODE SECTION 709.07(A) THAT A PROPERTY OWNER PROVE BOTH THAT:

(1) HIS LEGAL RIGHTS OR INTERESTS WOULD BE AFFECTED BY ANNEXATION.

AND

(2) THERE IS ERROR IN THE PROCEEDINGS BEFORE THE BOARD OF COMMISSIONERS.

IN ORDER TO SECURE AN INJUNCTION AGAINST ANNEXATION VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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OBJECTION TO JURISDICTION OF THIS COURT

Petitioner seeks review of the December 4, 1985 denial of certification by the Ohio Supreme Court. This Ohio Supreme Court judgment entry (Petition for Certification, Appendix A3) in boiler plate fashion states in part:

> . . . It is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

Petitioner invokes the jurisdiction of this court through 28 U.S.C. section 1257(3) claiming this language necessarily means the Ohio Supreme Court considered a constitutional question.

Fred Mayer asserts that the application of Ohio Revised Code section 709.07, which allowed his property to be annexed against his wishes, operates as a taking of his property without due process under the 5th and 14th Amendments to the U.S. Constitution. No federal constitutional question has been raised or considered by any other court until Petitioner applied to this court for a writ of certiorari.

Petitioner mistakenly relies on the judgment entry of the Ohio Supreme Court as the basis for this Court's jurisdiction. Neither the Ohio Ninth District Court of Appeals nor the Ohio Supreme Court considered a federal constitutional question.

The only issue before the first appellate court was whether the local County Council could decide an annexation petition beyond ninety days after the public hear-

ing under the language of Ohio Revised Code section 709.033(D).

The first mention of any constitutional basis for appeal is in Petitioner's Notice of Appeal to the Ohio Supreme Court. (Appendix App. 5) Petitioner attempted an appeal as of right under the Ohio Constitution, article IV, section 2B(2)(a)(iii) and under the guise of a case of great public or general interest. Article IV, section 2(B)(2)(d). However, Petitioner never argued or presented any constitutional grounds for an appeal to the Ohio Supreme Court. The two propositions of law presented to the Ohio Supreme Court by Petitioner were:

Proposition of Law Number One:

THE FAILURE OF A BOARD OF COUNTY COMMISSIONERS OR COUNTY COUNCIL TO MAKE ALL FINDINGS REQUIRED BY OHIO REVISED CODE SECTION 709.033(D) AS AMENDED EFFECTIVE SEPTEMBER 26, 1984, IN A DECISION RENDERED DECEMBER 17, 1984 IS SUFFICIENT ERROR FOR PURPOSE OF OHIO REVISED CODE SECTION 709.07(D)(1) TO PERMIT A TRIAL COURT TO ISSUE A PERMANENT 709.07 INJUNCTION AGAINST THE ANNEXATION.

Proposition of Law Number Two:

IT IS ERROR FOR PURPOSES OF OHIO REVISED CODE SECTION FOR A COUNTY COUNCIL OR A CHARTER COUNTY TO FAIL TO ACT ON A PETITION FOR ANNEXATION WITHIN THE NINETY (90) DAY PERIOD PRESCRIBED BY THE CHARTER COUNTY'S OWN ANNEXATION PROCEDURES.

Petitioners entire memorandum in support of jurisdiction filed with the Ohio Supreme Court is devoid of any

state or federal constitutional argument. At no appellate level prior to the notice of appeal to this court has Petitioner presented a constitutional ground for appeal.

By the very language in *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-86 (1945), that Petitioner excerpts in his petition for writ of certiorari, there is no federal constitutional issue that has ever been considered and decided by any of the appellate courts. Petitioner did not even impliedly raise the issue in state court that Chapter 709 of the Ohio Revised Code was unconstitutional.

The language in the judgment entry of the Ohio Supreme Court is a result of Petitioner seeking appellate review by the Ohio Supreme Court on two grounds under Article 2(B) of the Ohio Constitution:

(1) a case involving questions arising under the constitution of the United States or of this state; and
(2) a case of public or great general interest.

Since Petitioner never addressed any constitutional basis to the Ohio Supreme Court for his alleged appeal of right, the Supreme Court clearly dismissed the appeal in accordance with Rule II, section 3(B) of the Supreme Court Rules of Practice.

> (B) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will sua sponte, consider the case as a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

To follow Petitioner's logic on jurisdiction, every case dismissed under section 3(B) of Rule II of the Ohio Supreme Court Rules of Practice would mean the Ohio Supreme Court considered and decided a constitutional issue. It is clear that this Ohio Supreme Court Rule of Practice never meant to have that automatic jurisdictional effect on attempted appeals in the United States Supreme Court.

—o—

STATEMENT OF THE CASE

Fred Mayer and David Meeker owned 1.033 acres in an unincorporated territory called Northampton Township. On February 9, 1984, both Meeker and Mayer signed a petition to the Summit County Council seeking the annexation of their property to the City of Akron pursuant to Ohio Revised Code sections 709.02 and 709.03. A public hearing was held on June 4, 1984 in accordance with Ohio Revised Code section 709.032. In addition to signing the petition for annexation, both owners, Fred Mayer and David Meeker, presented affidavits to the County. Mayer's affidavit signed June 1, 1984 stated:

(1) It was in the best interests of the property and for the general good of the territory to be annexed to the City of Akron.

(2) The City of Akron could provide better services to the property.

On December 17, 1984, Summit County Council passed a resolution approving the annexation Resolution No. 84-726. (Petition for Writ of Certiorari, Appendix A35). The annexation materials were transmitted to Ed Davis, Clerk of Akron City Council for presentation to the City

of Akron pursuant to Ohio Revised Code sections 709.033 and 709.04.

On January 11, 1985 Mayer and Meeker dissolved their partnership. On January 31, 1985, Mayer filed an action under Ohio Revised Code section 709.07 seeking to enjoin the annexation of the property.

Mayer, in accordance with the requirements of Ohio Revised Code section 709.07(A) challenged the annexation. Under subsection A, Mayer, as an "interested person" has a twofold burden to sustain injunctive relief, i.e.:

(1) Mayer must prove by clear and convincing evidence that his legal interests or rights would be adversely affected by the annexation; and

(2) Mayer must prove that the board of County Commissioners (County Council) committed error under Ohio Revised Code section 707.04, 709.032 or 709.033.

The error claimed by Mayer under Ohio Revised Code section 709.07(A)(2) was that the Summit County Council granted the annexation petition beyond the ninety day time frame outlined in Ohio Revised Code section 709.033. The language of Ohio Revised Code section 709.033 was adopted by Summit County Council by Resolution.

The trial court found that Mayer met his burden of proof on both prongs of 709.07(A). However, the Ninth District Court of Appeals disagreed. The Ninth District Court found that Mayer only demonstrated that his legal rights or interests would be adversely affected but proved no other error under 709.07(A)(2). Mayer's claimed error that the County Council's approval of the annexation

beyond the ninety day limit was without merit. Since Mayer claimed no other error, he was not entitled to injunctive relief.

The Ninth District Court of Appeals reversed the trial court and directed the lower court to enter an order granting the annexation of Mayer's property. Mayer moved the Ohio Supreme Court for a motion to certify the record for review. This motion was dismissed.

As stated previously, the record does not demonstrate that Mayer ever presented and argued the federal constitutionality of Ohio's annexation laws.

—o—

ARGUMENT SUMMARY

Petitioner, Mayer, has not suffered any loss of a federal constitutional right or privilege. In fact, Mayer has been afforded due process since the day he signed an annexation petition. Mayer availed himself of Ohio annexation laws that provide avenues to annex property as well as prohibit the annexation of property. Because Mayer did not prevail in his attempt to stop this annexation after initially attempting annexation, he argues his rights to due process have been violated and the Ohio annexation laws are unconstitutional.

Ohio Revised Code section 709.02 only requires that a majority of landowners in a territory sought to be annexed need sign a petition for annexation. It is clear through the language of both Revised Code sections 709.02 and 709.033 that property can be annexed against a property owner's desires. However, section 709.07 affords

any dissident owner in the area to be annexed the opportunity to redress whatever wrong he claims from the annexation process.

Here Mayer as an "interested person" filed a 709.07 injunction action. However, Mayer did not prove an essential element to stop this annexation. Mayer did not show error in the proceedings before the County Council as required by section 709.07(A)(2). This lack of evidence production does not amount to violations of federal due process rights guaranteed by the Fifth and Fourteenth Amendments.

Petitioner's alleged error at all appellate levels under section 709.07(A)(2) was that the decision-making body on annexations (County Council) erred when it approved the annexation beyond the 90 day limit in Ohio Revised Code section 709.033. This was the only issue before the Ninth District Court of Appeals. Mayer simply did not sustain his burden of proof at the trial court level to support a 709.07 injunction. Mayer only demonstrated one element of the two-pronged requirements under 709.07(A)(1) and (2).

This annexation history does not amount to a constitutional deprivation but rather a self-imposed failure to meet a burden of proof.

———o———

ARGUMENT

THERE IS NO FEDERAL CONSTITUTIONAL PRINCIPLE IN THE FIFTH AND FOURTEENTH AMENDMENTS THAT IS VIOLATED BY THE APPLICATION OF OHIO REVISED CODE SECTION 709.07(A) IN ANNEXATION PROCEEDINGS.

The Ninth District Court of Appeals decision clearly stated that Mayer was not entitled to an injunction because he failed to prove an essential prerequisite.

Ohio Revised Code section 709.07(A) reads:

> (A) Within sixty days from the filing of the papers relating to the annexation with the auditor or clerk as provided by division (D) of section 707.04 or by section 709.033 [709.03.3] of the Revised Code, any person interested, and any other person who appeared in person or by an attorney in the hearing provided for in section 709.031 [709.03.1] of the Revised Code, may make application by petition to the court of common pleas praying for an injunction restraining the auditor or clerk from presenting the annexation petition and other papers to the legislative authority. The petition or a person interested shall set forth facts showing:
>
> (1) How the proposed annexation adversely affects the legal rights or interests of the petioner;
>
> (2) The nature of the error in the proceedings before the board of county commissioners pursuant to section 707.04, 709.032 [709.03.2], or 709.033 [709.03.3] of the Revised Code, or how the findings or order of the board is unreasonable or unlawful.

The petition of any other person shall set forth facts application to division (A)(2) of this section.

Based on these standards the Ninth District Court of Appeals reviewed Mayers claimed error before the County Council, i.e., that the decision on the annexation petition was rendered beyond the ninety day limit mentioned in section 709.033. The Court in its decision succinctly states the basis for its reversal of the trial court and the annexation order:

> R.C. 709.07 requires one petitioning for injunctive relief to make a two-fold showing. First, the petitioner must demonstrate by clear and convincing evidence that his legal interests or rights would be adversely affected by the annexation. Mayer has satisfied this first requirement by his showing that the annexation would cause him to pay higher taxes, would make his property more difficult to lease, and would cause him to lose those tenants presently leasing his property.
>
> Secondly, R.C. 709.07 requires the petitioner to demonstrate error in the annexation proceedings. As indicated above county council committed no error in delaying the annexation decision beyond the ninety day time period. Since Mayer has shown no other error in the annexation proceedings before county council, he has failed to satisfy this second requirement. Mayer is consequently not entitled to the injunctive relief afforded under R.C. 709.07.

Petitioner has disguised his failure to sustain his burden of proof as a monumental constitutional deprivation of his property.

The landmark Supreme Court decision in the annexation field is *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). *Hunter* has not stood for the proposition that states have unfettered discretion to establish or reorganize its political subdivisions. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Rather, *Hunter* characterizes state annexation processes as political matters entrusted to state legislatures.

In *Hunter*, residents of Allegheny, the territory being annexed to Pittsburgh, challenged the constitutionality of a Pennsylvania annexation statute. Under the statute, if a majority of the votes cast in Pittsburgh and Allegheny favored annexation, then annexation could proceed. Although the majority of the residents of Allegheny opposed their annexation, the annexation proceeded. Just as the instant Petitioner Mayer claims, the Allegheny residents challenged Pennsylvania's annexation laws as repugnant to the Fifth and Fourteenth Amendments.

The Supreme Court in *Hunter* discussed the Fifth Amendment's application to annexation laws.

> We have nothing to do with the policy, wisdom, justice, or fairness of the act under consideration; those questions are for the consideration of those to whom the state had entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the Constitution of the state and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final. 207 U.S. at 176.

The Court's discussion concerning the Fourteenth Amendment indicates a clear deference to the state in matters of annexation.

The Sixth Circuit Court of Appeals has consistently upheld state annexation procedures against constitutional challenges by relying on *Hunter*. *Detroit Edison Co. v. East China Township School District No. 3*, 378 F.2d 225 (6th Cir. 1967), cert. den. 389 U.S. 932 (1967); *Deane Hill Country Club Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967) cert. den. 389 U.S. 975 (1967); *Carlyn v. Akron*, 726 F.2d 287 (6th Cir. 1984).

The Court of Appeals in *Detroit Edison* cites at page 229 decisions from the Fifth and Tenth Circuits to support its conclusion. In *Hammonds v. City of Corpus Christi*, 343 F.2d 162 (5th Cir. 1965), cert. denied, 382 U.S. 837 (1965), the court found no error in the District Court's decision which dismissed the complaint on the ground, among others, that "the annexation of lands to a city has been held without exception to be purely a political matter, entirely within the power of the State Legislature to regulate." And in *International Harvester Co. v. Kansas City*, 308 F.2d 35 (10th Cir. 1962), cert. denied, 371 U.S. 948 (1963), after quoting from *Hunter* the court stated:

> Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. * * * *Id.* at 39.

Following *Detroit Edison* is another Sixth Circuit decision pertaining to annexation, *Deane Hill Country Club Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967), cert. denied 389 U.S. 975 (1967). Here the plaintiffs also asserted Fifth and Fourteenth Amendment challenges. The court indicated:

> It is clear, for the reasons set forth in the *Detroit Edison Co. v. East China Township School District, supra*, that *Hunter* precludes constitutional challenge under the Fourteenth Amendment to annexations by municipal corporations of adjoining territories on the basis of the procedure employed or authorized by the state or because of the pecuniary repercussions in the form of the ordinary incidence of city taxation. It follows that the District Court properly dismissed the complaint herein. *Id.* at 325.

The only exception in annexation cases subjecting state statutes to review under due process or equal protection are boundary changes for the purpose of racial discrimination which is not at issue here.

The Supreme Court has reemphasized the significance of *Hunter* in addressing powers reserved to the states in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 58 (1978).

> In *Hunter v. Pittsburgh*, the court discussed at length the relationship between a State and its political subdivision, remarking: "The number, nature and duration of the power conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." Ibid. While the broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases such as *Kramer v. Union Free School Dist.*, *supra*, we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them. *Id.* at 71.

Carlyn v. City of Akron, 726 F.2d 287 (6th Cir. 1984), presented the exact issue Petitioner Mayer has asserted—Are Ohio's annexation statutes federally constitutional? The Sixth Circuit upheld the constitutionality of Ohio's annexation laws. As the court noted in *Carlyn*, annexation is state social policy not a constitutional infraction.

Petitioner Mayer misinterprets the breadth of *Garcia v. San Antonio Metro Transit Auth.*, — U.S. —, 105 S.Ct. 1005 (1985), as a cry for this court to redefine states rights beyond the commerce clause. More importantly *Garcia's* reach does not touch state annexation processes.

———o———

CONCLUSION

Respondents respectfully request this Court deny the Petition for a writ of certiorari. Petitioner failed to properly invoke the jurisdiction of this Court by timely raising the federal constitutionality of Ohio's annexation statutes. In addition, Petitioner has consistently been afforded due process since the inception of this annexation process.

Respondents request that the decision of the Ninth District Court of Appeals, Summit County, Ohio, be permitted to stand and that this annexation proceed according to the Court's order.

Respectfully submitted,

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Attorneys for Respondents,
EDWARD DAVIS, Clerk
of Akron City Council and
PATRICIA C. AMBROSE, Agent
for the Petitioners for
Annexation

APPENDIX

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of the ? igest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended May 7, 1968).

RULE I

NOTICE OF APPEAL

SECTION 1. From Court of Appeals.

(A) The notice of appeal from a Court of Appeals must be filed in the court from which the case is appealed within thirty days from the entry of the judgment or final order appealed from and shall state:

(a) The name of the court and date of the order or judgment appealed from, and

(b) If applicable, that the case originated in the Court of Appeals, and

(c) If applicable, that the case involves a substantial constitutional question.

(d) If a timely notice of appeal is filed in the Court of Appeals by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed.

(B) A copy of that notice of appeal must be filed or offered for filing in the Supreme Court not later than thirty days after the filing of such notice in the Court of Appeals. The copy of the notice of appeal shall show the date of filing in the Court of Appeals.

RULE II

DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEALS

SECTION 3. Consideration as to Existence of Constitutional Question.

(A) If an appellant contends that a case involves a substantial constitutional question and also contends that such case is of public or great general interest, it is necessary to file only one notice of appeal. (See Rule I [A][a] and [c]).

(B) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will *sua sponte*, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

CASE NO. C.A. 12090

COMMON PLEAS CASE NO. 85-1-0312

FRED MAYER,

Plaintiff-Appellee

vs.

EDWARD DAVIS, ET AL.

Defendants-Appellants

NOTICE OF APPEAL
(Filed in the Court of Appeals on Sept. 11, 1985)

The Appellee Fred Mayer hereby gives notice of his appeal to the Supreme Court of Ohio from the judgment of the Ninth District Court of Appeals for Summit County, dated 28 August 1985. This case did not originate in the Court of Appeals. This case does involve a substantial constitutional question and does present a question of public or great general interest.

Respectfully submitted,

/s/ Alfred E. Schrader
ALFRED E. SCHRADER
Attorney for Appellee
411 Wolf Ledges Parkway, Suite 401
Akron, Ohio 44311
(216) 762-6477

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by Ordinary U.S. Mail to Patricia Ambrose, Assistant Akron Law Director, 202 Ocasek Government Office Building, 161 S. High St., Akron, Ohio 44308, this 11 day of September 1985.

/s/ Alfred E. Schrader
ALFRED E. SCHRADER
Attorney for Appellee, Fred Mayer

IN THE SUPREME COURT OF OHIO

CASE NO. 85-1582

FRED MAYER

Appellant

vs.

EDWARD DAVIS, CLERK
OF THE CITY OF AKRON, et al.

Appellees

NOTICE OF APPEAL

SUMMIT COUNTY COMMON PLEAS
CASE NO. 85-1-0312

NINTH OHIO APPELLATE DISTRICT
CASE NO. 12090

The Appellant, FRED MAYER, of Summit County, Ohio, gives notice of his appeal to the United States Supreme Court from the judgment of this Court dated December 4, 1985, wherein this Court dismissed Appellant's appeal on the ground that no substantial constitutional question exists herein (Justice Brown dissenting).

This Appeal is brought and the United States Supreme Court has jurisdiction, pursuant to 28 U.S.C. 1257(2).

This Appeal involves the Federal constitutional right to due process under the United States Constitution, 14th Amendment and involves the procedural due process element that specific findings by County Commissioners are necessary, prior to the passage of a resolution permitting annexation.

This Appeal also involved Federal constitutional property rights as well as issues of federalism, as to whether or not a state may ignore Federal constitutional rights of individuals, in matters of political subdivision boundary changes.

/s/ Alfred E. Schrader
ALFRED E. SCHRADER
Attorney for Plaintiff
411 Wolf Ledges Parkway, Suite 401
Akron, Ohio 44311
(216) 762-6478

AFFIDAVIT OF SERVICE

I, ALFRED E. SCHRADER, being first duly sworn according to law, do hereby depose and say that all parties required to the Supreme Court Rules to be served have been served pursuant to Rule 28.5 (c) and 28.4 (c). A copy of the foregoing Notice of Appeal to the United States Supreme Court was filed with the Ohio Supreme Court and the Ninth Ohio District Court of Appeals and sent by regular U.S. Mail, First Class, postage prepaid, to Attorney Patricia Ambrose, Assistant Law Director, City of Akron, 161 S. High Street, Akron, Ohio 44308; and upon Anthony Celebrezze, Ohio Attorney General, 30 E. Broad Street, Columbus, Ohio 43215, this 11th day of December, 1985.

/s/ Alfred E. Schrader
ALFRED E. SCHRADER
Attorney for Appellant
411 Wolf Ledges Parkway, Suite 401
Akron, Ohio 44311
(216) 762-6478

SWORN TO before me and subscribed in my presence this 11 day of December 1985.

/s/ Eugene L. (illegible)
Notary Public
Attorney at Law
No Expiration

Supreme Court, U.S.
FILED
MAY 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1627

In the Supreme Court of the United States

October Term, 1985

FRED MAYER, Property Owner,
Summit County, Ohio,
Petitioner,

vs.

EDWARD DAVIS, CITY OF AKRON, OHIO
and PATRICIA C. AMBROSE,
Agent for Annexation Petitioners,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF OF PETITIONER

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May 6, 1986

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REPLY BRIEF OF PETITIONER

Respondents, EDWARD DAVIS, CLERK OF THE AKRON CITY COUNCIL, and PATRICIA C. AMBROSE, AGENT FOR ANNEXATION PETITIONERS, have in their opposing brief in No. 85-1627, ignored the Petitioner's request for alternative relief. That request in essence, was that this Court grant review, summarily vacate the judgment below, and remand the matter to the Ohio Supreme Court to consider the probable adequate state grounds based on the merger of Petitioner's property with the City of Cuyahoga Falls. That merger occurred sub-

sequent to the Ohio Supreme Court's decision below, and had it occurred prior to the time the Ohio Supreme Court decided this matter, would have resulted in a contrary result based on State Law.

In essence, the Petitioner argues that once the merger occurred, the Akron City Council has absolutely no authority to accept or reject the annexation, and that this acts as an absolute bar to the completion of the Mayer annexation.

Thus, Petitioner asks this Court to reverse and remand in order to give the Ohio Supreme Court the opportunity to consider the effect of merger. Further, Petitioner believes that the Ohio Supreme Court could reasonably be expected to declare that the fact of merger extinguished the annexation proceedings in this case. In doing so, the result would be opposite that reached by the Ohio Supreme Court in this matter, and would obviate the necessity for this Petition for Writ of Certiorari to be considered by the United States Supreme Court.

The fact that the Respondents did ignore this alternative request for relief is perhaps understandable. That is, Petitioner's argument for alternative relief on pages 21-25 of its Petition for Writ of Certiorari, was based essentially on the analogous case of *Board of County Commissioners v. Elyria* (1962), 174 Ohio St. 135. Because the merger involving Petitioner's property, was the first merger ever to occur in the State of Ohio pursuant to O.R.C. 709.45 et seq., no prior case law had existed on this matter in the State of Ohio.

On April 9, 1986, the Common Pleas Court of Summit County, Ohio decided a case exactly on point and in part encompassing the property of Petitioner, Fred Mayer.

In this decision, the Ohio Court found that indeed the merger of Northampton Township to the City of Cuyahoga Falls, extinguished the pending annexation petition. This is further proof that the Ohio Courts, if given the opportunity, would rule in the manner that Petitioner suggested in his request for alternative relief to this Court.

Interestingly, Respondent, Patricia C. Ambrose, was attorney of record in the case of *Edward Davis, Clerk of Akron City Council v. Northampton Township Trustees, Northampton Township, et al.*, Case 85-124073, unreported, a copy of which is reproduced for the Court's review in the appendix.

The remainder of Respondent's brief in opposition essentially makes those arguments one would expect from a Respondent's brief in a Petition for Writ of Certiorari case. Therefore, no additional comment is made as to those arguments.

For the reasons set forth above, the Petitioner respectfully requests this Court to grant its Petition for Certiorari, or in the alternative, to grant review, summarily vacate the judgment below and simultaneously remand the case to the State Court below to consider Federal and State grounds for review, as had been requested in Petitioner's original Petition for Writ of Certiorari.

Respectfully submitted,

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Phone: (216) 762-0765
Attorney for Petitioner

APPENDIX

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO, IN EDWARD DAVIS, CLERK OF AKRON CITY COUNCIL v. NORTHAMPTON TOWNSHIP TRUSTEES, NORTHAMPTON TOWNSHIP, ET AL.

(Filed April 9, 1986)

Case No. CV 85 12 4073

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

EDWARD DAVIS, CLERK OF AKRON CITY COUNCIL, *et al.*,
Plaintiffs,

vs.

NORTHAMPTON TOWNSHIP TRUSTEES, NORTHAMPTON TOWNSHIP, *et al.*
Defendants.

JUDGMENT ENTRY

This matter is before this Court in consideration of Plaintiffs, Edward Davis, et al.'s Brief in Support of Declaratory Judgment, filed February 3, 1986, and Defendant, City of Cuyahoga Falls, et al.'s Brief in Opposition, filed February 24, 1986.

Upon consideration of the pleadings submitted, the Court makes the following findings:

The Court finds that the parties have stipulated to the following facts:

1. On June 3, 1983, two of the three owners of 141.8 acres of land in Northampton Township filed a petition for annexation to the City of Akron with Summit County Council.

2. This property was composed of three tracts of land owned one each by the City of Akron, Welcome Radio Association and Ernest Sommers.

3. The City of Akron and Welcome Radio Association signed the petition for annexation as owners of 90 of the 141.8 acres.

4. A public hearing was held before Summit County Council on August 15, 1983 to hear the merits of granting the annexation. Ernest Sommers, owner of 51.8 acres in the annexation territory testified in opposition to the annexation.

5. On February 6, 1984, Summit County Council in Resolution 84-79 denied the petition on the grounds that the majority of the landowners had not signed the petition, and that the general good of the territory would not be served.

6. On February 15, 1984, the Petitioners, through their agent, appealed these findings to the Summit County Court of Common Pleas (Case No. CV 84-2-0474).

7. On February 11, 1985, the Court of Common Pleas reversed the determination of Summit County Council on the basis that County Council's decision was illegal, arbitrary and not supported by the preponderance of the evidence.

8. On February 26, 1985, the Court of Common Pleas issued supplemental findings that the general good of the territory would be served by annexation and ordered that the annexation petition be granted.

9. Appeal was taken to the Ninth District Court of Appeals on February 27, 1985.

10. From March 1, 1985 to October 30, 1985, the City of Akron Clerk and Council were stayed from acting on the annexation and accepting the annexation territory.

11. On October 30, 1985, the Ninth District Court of Appeals reversed the Common Pleas Court ruling. Currently, the Ohio Supreme Court is considering Petitioners' Memorandum in Support of Jurisdiction, attempting to reverse the Ninth District's decision.

12. On February 9, 1984, the owners of 1.033 acres of land known as 1862 Akron-Peninsula Road in Northampton Township filed a petition for annexation to the City of Akron with Summit County Council.

13. On February 9, 1984, Fred Mayer and David Meeker owned this property as equal partners.

14. Before February 9, 1984 both Fred Mayer and David Meeker signed the petition for annexation.

15. A public hearing was held before Summit County Council on June 4, 1984.

16. On December 17, 1984, Summit County Council in Resolution 84-726 approved the annexation petition.

17. Subsequent to Summit County Council's approval of the petition for annexation, Fred Mayer became the sole owner of the property and sought to enjoin the annexation, which injunction was granted on March 8, 1985, by the Summit County Common Pleas Court.

18. From this, Akron appealed and on August 25, 1985, the Ninth District Court of Appeals ruled that the annexation could proceed. The Ohio Supreme Court on December 4, 1985 dismissed Fred Mayer's attempted appeal from that ruling. Currently, the matter is stayed pending a request for appeal to the U.S. Supreme Court.

19. On February 13, 1984, the petition for the election of a merger commission for the merger of Cuyahoga Falls, a municipality, and of Northampton Township, the unincorporated territory of a township, was filed with the Summit County Board of Elections, pursuant to O.R.C. Section 709.45.

20. The petition for annexation of 141.8 acres to the City of Akron (para. 1) had been filed with Summit County Council before the petition for the election of a merger commission for the merger of Cuyahoga Falls and Northampton Township was filed with the Summit County Board of Elections.

21. The petition for annexation of 1.033 acres of the City of Akron (see para. 12) had been filed with Summit County Council before the petition for the election of a Northampton/Cuyahoga Falls Merger Commission was filed with the Summit County Board of Elections.

22. On November 6, 1984, the Cuyahoga Falls/Northampton Merger Commission was elected.

23. On July 24, 1985, the Merger Commission agreed to conditions of merger.

24. On November 5, 1985, the voters of Northampton Township and Cuyahoga Falls elected to merge pursuant to the conditions agreed to by the Merger Commission.

25. On January 1, 1986, the Northampton/Cuyahoga Falls merger took effect under O.R.C. Section 709.47.

CONCLUSIONS OF LAW

Ohio Revised Code Section 709.48 states in pertinent part:

> On and after the date on which a petition is filed with the board of elections under section 709.45 of the Revised Code for the election of a merger commission for the merger of a municipal corporation and the unincorporated territory of a township, no petition for the annexation of any part of the unincorporated territory of the township shall be filed with a board of county commissioners under section 709.03 or 709.15 of the Revised Code, until one of the following occurs: . . .

The statute does not address the status or manner to proceed with petitions for annexation filed prior to the petition for merger.

In *Board of County Commissioners v. Elyria* (1962), 174 Ohio St. 135, the Court stated:

> The jurisdiction which attached when the proceeding was instituted was valid jurisdiction to conduct an annexation proceeding involving annexation of part of a village to a city. The subject matter over which the board had jurisdiction as to annexation related only to annexation of part of a village to a city and not as to part of a city to another city. When North Ridgeville changed its status, the subject matter of the annexation was changed also, and because of the statutory differences in the annexation proceedings the change of status of North Ridgeville from a village to a city divested the board of its jurisdiction over the subject matter, and any further action taken by the board would have been a nullity. *Id.*

> Although a change of conditions during the pendency of an annexation proceeding before a Board of County Commissioners which does not affect the subject matter of the proceeding may not divest the board of its jurisdiction, a change of conditions which does affect the subject matter so that the statutory basis of jurisdiction no longer exists divests the board of its jurisdiction.

Id. at 139.

The Court finds the reasoning in *Elyria* to be applicable to the case *sub judice*. As a result of the merger, Summit County Council and Akron City Council have been divested of any authority to perform the required acts to conclude the annexations.

The pending annexation petitions are extinguished as a result of the merger of Northampton and Cuyahoga Falls.

Judgment for Defendants.

It is so ordered.

There is no just cause for delay.

MARY F. SPICER
Judge